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No. 91-217

FILED
OCT 21 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

JOINT REPLY BRIEF OF PETITIONERS TO KALISPEL INDIAN TRIBE'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners, State of Washington and Public Utility District No. 1 of Pend Oreille County (hereinafter "State" and "PUD"), are filing this Joint Reply Brief pursuant to Rule 15.6 to address arguments raised by the Kalispel Indian Tribe (hereinafter "Tribe") in the Tribe's Brief in Opposition.[1] The Tribe raises two new issues: (1) did the court below reasonably construe state law; and (2) the issue presented is not one of special importance (Tr. Br. pp. 1, ii). These issues will be discussed seriatim.

The record is [illegible] supplemented, pursuant to Rule 15.7, by reproducing a copy of the 9th Circuit Court's order

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[1]As of the date of preparing this reply brief, Petitioners have not yet been served with copies of the United States brief in opposition to our joint petition for writ of certiorari.

denying the PUD's motion for stay of mandate as Appendix "A" pursuant to Rule 15.7.

REPLY ARGUMENT

1. The Court Below Did Not Reasonably Construe State Law.

The Tribe erroneously asserts that there is no case law contrary to the definition of ordinary high water adopted by the court below. The State and the PUD have already pointed out that if the line of ordinary high water is defined to be the lowest elevation to which edible vegetation will grow, then it really depicts the line of ordinary low water (Joint Pet., pp. 33-34). The question thus becomes: Under State law, the shore boundary of the State's sovereign property interests the line of ordinary low water? The State and PUD submit it is clear that the "line of ordinary high water," as that phrase is used in Wash. Const. Art. XVII,

§1, to describe the shore boundary of the State's ownership along freshwater navigable rivers was intended to describe a boundary locatable on the ground in a manner like the "line of ordinary high tide" along tidal waters. (See Appendix, p. 1a.) This is so because identical words are used to describe the boundary of the state's ownership for both fresh and salt waters, e.g., "ordinary high water" and "ordinary high tide." Wash. Const. art. XVII, § 1. There is no logical basis to ascribe a different meaning to identical descriptive words. There is no basis under Washington law to ascribe different meanings to the words "ordinary high" in Art. XVII, §1 language - a point which will be discussed in more detail hereafter. At Tr. Br. in Op., p. 17, the Tribe has admitted that Washington Constitution, Art. XVII, §1, describes the boundary at issue.

Washington courts have interpreted Wash. Const. Art. XVII, §1, on several occasions. *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909) holds that the shore boundary line of tidelands or shorelands is the line of mean high tide or mean high water. *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 Pac. 349 (1910) similarly holds that when a stream or other body of water forms a boundary, the mean high water line--not the extreme high water line--is the boundary. Neither of these decisions were cited or discussed in *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59 (1912). Subsequently, the Washington Supreme Court has interpreted Wash. Const. Art. XVII, §1, in relation to tidelands on two occasions. *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957) adopted an upland vegetation test for establishment of the line or ordinary high tide.

The upland vegetation test was overruled in favor of a mathematical calculation of the boundary based on an average of all high tides during a lunar cycle. *Hughes v. State*, 67 Wn.2d 799, 410 P.2d 20 (1966); rev. on other grounds, *Hughes v. Washington*, 389 U.S. 290, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967).[2]

From this discussion, it is clear that the Tribe's contention that there is no contrary Washington case law construing Wash. Const. Art. XVII, §1, is in error. Moreover, the conclusion reached by the court below (that the boundary on the Pend Oreille is the average of all flows or the mean annual flow; *see* App., pp. 28a and 32a) fails to ascribe any meaning to the word "high" in Wash. Const. Art. XVII, §1.

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[2]Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 26-27, 80 L.Ed 9, 56 S.Ct. 23 (1935), held that tidelands conveyed by a federal patent extend to the calculated line of mean tide as a matter of federal law.

Thus, the construction of Washington's constitution by the Ninth Circuit Court of Appeals was unwarranted, unreasonable and in error.

The State and PUD argue that the court below abused its discretion by refusing to certify this state law legal issue to the Washington Supreme Court with respect to the line of ordinary high water boundary described in Wash. Const. Art. XVII, §1. (Joint Pet., pp. 35-37.) The general rule, under Washington law, is that the boundary for tidelands and shoreland is ascertainable and locatable, on the ground, by averaging of high waters or averaging of high tides, in order to accomplish the paramount purpose of the equal footing doctrine to preserve a state's constitutional interest in these sovereign lands.

The United States Supreme Court has pending before it the issue of whether or

not the federal courts have erroneously construed *Austin v. Bellingham*,[3] and whether or not the federal courts erroneously construed or applied state law in determining the boundary between the state's sovereign land and federal upland, which boundary is the line of ordinary high water on a navigable river. The issue of the determination of the boundary - line of ordinary high water and the applicability of *Austin v. Bellingham* - has been squarely presented to the Supreme Court of the State of Washington in *Public Utility District No. 1 of Pend Oreille County and State of Washington v. Tombari Family Limited Partnership, et al.*, Supreme Court of Washington docket no. 57239-9[4]. *PUD and State v. Tombari* was

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[3]69 Wash. 677, 126 Pac. 59 (1912).

[4]Hereafter referred to as "*PUD and State v. Tombari.*"

fully briefed and was orally argued to the Supreme Court of Washington on May 28, 1991.

The facts before the Supreme Court of Washington are the same facts that were presented in *United States v. Pend Oreille County Public Utility District No. 1*, 926 F.2d 1502 (9th Cir. 1991)[5] and in *United States v. Pend Oreille County Public Utility District No. 1*, United States District Court for the Eastern District of Washington, Docket No. C-80-116-RMB. If the law established by the Supreme Court of Washington differs from the law established by the federal courts, obviously the decision of the federal courts will be "clearly wrong" and the argument of the Tribe will be without foundation. If the law established by the Supreme Court of Washington confirms the

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[5]Hereafter referred to as *U.S. v. PUD*.

law assumed by the federal courts, the Petitioners (PUD and State) have agreed to voluntarily withdraw their Petition for Writ of Certiorari and, ipso facto, the argument made by the Tribes will be moot.

The State and PUD also take issue with the Tribe's reliance upon *Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923), as relevant to this state law issue. (Tr. Br. in Opp., p. 22.) Such reliance is at odds with the acquisition of state ownership to both the beds and shores of all navigable waters up to and including the lines of ordinary high water found in Wash. Const. Art. XVII, §1. *Oklahoma v. Texas, supra*, is but one of a series of cases decided by the U.S. Supreme Court in the dispute between Oklahoma, Texas and the United

States.[6] *Oklahoma v. Texas*, cited by the Tribe, is inappropriate to this case at bar and is distinguishable because: (1) it only purports to define a treaty boundary;[7] (2) it involves the definition of the "south bank of the Red River" and involved only a "river bed," not river shores;[8] and (3) *Oklahoma v. Texas* involves a nonnavigable river and thus does not stand for any equal footing doctrine proposition.[9]

The State and the PUD submit that the court below erred by relying upon *Austin*

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[6]*See*, *Oklahoma v. Texas*, 256 U.S. 70, 65 L.Ed. 831 (1921); *Oklahoma v. Texas*, 258 U.S. 574, 66 L.Ed. 771 (1922); and the case cited by the Tribe, *Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 42 (1923).

[7]*Id.*

[8]*Id.*

[9]*Oklahoma v. Texas*, supra at 258 U.S. at 508-509. It is noteworthy that the Red River at issue in *Oklahoma v. Texas* does not have a hydrological cycle that includes an annual ordinary high water.

v. Bellingham, 69 Wash. 677, 126 Pac. 59 (1912) as a complete and unambiguous statement of Washington law for the following reasons:

(1) *Austin* does not interpret Wash. Const. Art. XVII;

(2) The State was not a party to *Austin*;[10]

(3) *Austin* has never been cited since by the Washington Supreme Court for the proposition relied upon by the federal court below;

(4) *Austin* involved facts which are ambiguous as to whether it was intended to describe a boundary based on upland vegetation (as the State and PUD contend)

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[10] As the holder of sovereign lands by operation of the equal footing doctrine, Washington should not be stripped of its entitlement to protect the public trust by inference and implication from an ambiguous 1912 decision.

or some other lower line (as the Tribe contends).[11]

2. The Issue Presented is One of Special Public Importance.

The equal footing doctrine comprehends both the shores and the beds of navigable waters. The argument that non-navigable tidelands were beyond the scope of the equal footing doctrine was rejected by this Court when it stated that: "It has been long established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 98 L.Ed.2d 877, 885, 108 S.Ct. 791 (1988). We are not here

[11]Austin's land was covered by tame grass, trees and stumps. Upland vegetation denotes that the lake shore boundary is below such vegetation and is thus consistent with the State's administrative interpretation and the position taken in this proceeding.

concerned only with the beds of navigable waters as the Tribe maintains. (Tr. Br. in Opp., pp. 16-17.) Both the State and the PUD are concerned with protection of the public's interest in these sovereign lands, both beds and shores. The point is simply that the beds and shores of freshwater navigable streams were not granted by the United States Constitution to the United States or to a riparian land owner. Such aquatic lands were reserved by the original 13 states which created the United States and, by force of the equal footing doctrine, to subsequently admitted states.[12]

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[12] *State Land Bd. v. Corvallis Land & Gravel Co.*, 429 U.S. 363, 373, 975 S.Ct. 582, 50 L.Ed.2d 550 (1927); *Shively v. Bowlby*, 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 (1894); *Barney v. Keokuk*, 94 U.S. 324, 328, 24 L.Ed. 224 (1876); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212, 227-29 (1845). The principle announced in these decisions governs this case.

Moreover, sovereign lands are held by a state or its grantee subject to the constraints of the public trust doctrine. *Phillips Petroleum*, 484 U.S. at 479. Diverse public uses of such lands have been recognized under the public trust doctrine including fishing, shellfish production and land reclamation. *Id.*, 484 U.S. at 476. Additional public trust uses have been recognized by the Washington Supreme Court as encompassed by the public trust doctrine: travel, boating, swimming, bathing, water skiing, public recreational docks, and environmental protection. *Caminiti v. Boyle*, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987); *Orian Corp. v. State*, 109 Wn.2d 621, 640-41, 747 P.2d 1062 (1987). The public's right of multiple uses of the shores of navigable rivers under the public trust doctrine, as conveyed by the equal footing doctrine,

involve an issue of special importance warranting review by the Supreme Court.

This U.S. Supreme Court has always recognized the importance of issues involving boundary disputes between the United States and a State, particularly where such disputes involve the beds and shores of navigable waters.[13] This case involves ten miles of shoreland along the Pend Oreille River. The issue relates to thousands of miles of shoreland on fresh water lakes and rivers in the State of Washington.

CONCLUSION

The line of ordinary high water along navigable rivers is a significant boundary insofar as the public uses of shorelands are concerned. The issue is one properly to be determined pursuant to state law.

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[13]E.g., *California ex rel. State Lands Comm. v. U.S.*, supra at 457 U.S. at 476-477; and *State Land Bd. v. Corvallis*, supra at 429 U.S. at 372-375.

Yet, by erroneously constructing state law by uncritical reliance on the *Austin* decision and by arbitrary refusal to certify the issue to the State Supreme Court, the Ninth Circuit Court of Appeals has substantially clouded and impaired Washington's sovereign title to the shores of freshwater navigable streams. Such a result violates the constitutionally based reservation of sovereign lands and rights by the original 13 states and the sovereign lands and rights conveyed to new states by operation of the equal footing doctrine.[14]

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[14]The Tribe's suggestion that the court below correctly rules because otherwise it would impede federal purposes in creating the Kalispel Indian Reservation is spurious. The reservation was created by Executive Order in 1914 and is described in accordance with GLO surveys. Washington became a state in 1889. Moreover, the reservation did not purport to include the beds or shores of navigable waters because such aquatic lands were excluded from survey by the U.S. Manual for Surveying Public Lands. See Appendix to Joint Petition, p. 17a., and fn. 5 at p. 35a.

A writ of certiorari should be granted and the decision of the 9th Circuit Court of Appeals stayed pending a decision of the Supreme Court of Washington in PUD and State v. Tombari Family Limited Partnership, Docket No. 57239-9, which has been briefed, argued and is awaiting a decision. No reason has been given by the 9th Circuit Court of Appeals or any party for the need to rush to a final federal decision, especially if it is wrong.

DATED this 17th day of October, 1991.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff-Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor-Appellant.

No. 88-3617
D.C.No. CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian

APPENDIX

Tribe and individual allottees,
Plaintiff-Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellant,

and

DEPARTMENT OF NATURAL
RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor.

No. 88-3618
D.C.No. CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian
Tribe and individual allottees,
Plaintiff-Appellant,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

APPENDIX

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellee,

and

DEPARTMENT OF NATURAL
RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor.

No. 88-3619
D.C.No.
CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian
Tribe and individual allottees,
Plaintiff,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff-Appellant,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellee,

APPENDIX

and

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor-Appellee.

No. 88-3669
D.C.No. CV-80-116-JLQ

APPEAL FROM: United States District Court for the Eastern District of Washington
Richard M. Bilby and Justin L. Quackenbush, District Judges, Presiding

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Argued and submitted:
October 30, 1989-Seattle, Washington
Filed: March 6, 1991

Before: BROWNING, SCHROEDER and FLETCHER, Circuit Judges.

The motion of appellee Pend Oreille Public Utility District No. 1 to recall the mandate and withdraw the judgment is denied.